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Chairman: Mr. Tomka ..... (Slovakia)

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The meeting was called to order at 10.10 a.m.

Agenda item 150: Establishment of an international criminal court (*continued*) (A/AC.249/1997/L.5 and L.8/Rev.1)

1. **Mr. Hafner** (Austria) said that his delegation wholeheartedly supported the statement of the Netherlands on behalf of all Member States of the European Union, including his own.

2. The two sessions of the Preparatory Committee on the Establishment of an International Criminal Court had been extremely useful and had proven that it was a good mechanism for elaborating a statute and ultimately paving the way for the establishment of an international criminal court. It was, moreover, the appropriate way to generate wide support for the court.

3. The results of the two sessions were all the more remarkable in that they had dealt with difficult matters such as the definition of crimes, the trigger mechanism, inherent jurisdiction, complementarity and certain procedural issues, to mention only the most important.

4. Although great progress had been made in the definition of crimes, further work was urgently needed, and his delegation looked forward to the continuing discussions on the matter.

5. As to automatic or inherent jurisdiction, views had been clarified, providing a clear basis for discussion in future negotiations.

6. Complementarity was one of the most difficult issues because the objective was to define the boundary between the areas that would remain under the jurisdiction of individual States and those that would come under the international jurisdiction of the international criminal court, allowing for certain necessary overlaps. The line drawn between the two areas had to establish a delicate balance between traditional patterns of criminal jurisdiction on the one hand and new forms of jurisdiction on the other, which would meet legitimate universal expectations and be considered absolutely necessary. The dividing line nevertheless had to be firm and stable enough to withstand future clashes of legal arguments in specific cases. While it could be argued that the complex arrangement of the document produced by the Preparatory Committee at its August session might reduce the likelihood of its acceptance, his delegation supported the text because it appeared to be workable, even though some improvements could still be made.

7. An initial attempt had been made to devise a procedure applicable to complementarity in connection with admissibility. Although there was no doubt that it would be for the court to take the final decision on its own jurisdiction, the procedures provided for in the existing text and the proposals were complicated, too elaborate and sometimes even inconsistent and incomplete. Although the matter was admittedly complex, more harmonization, some simplification and a clearer structure would be advisable.

8. The proposals put forward thus far made it abundantly clear that the prosecutor had a decisive role in the activities of the court. The discussion had focused on the scope of the prosecutor's functions and on his or her independence from States. There again the question arose whether the court would remain to a large extent an organ at the service of States and dependent on complaints submitted by them, or whether it would become an instrument of humankind, committed only to the general objective of protecting it against the most heinous crimes. The ideal would be for the court's activities not to be hindered by any political interference prompted by State interests. However, it could of course be argued that giving such autonomy to the prosecutor might not be conducive to the court's wide acceptability. To provide a mechanism with a measure of control over that autonomy, his delegation and others had proposed the establishment of a special chamber, called the "indictment chamber", which, if the need arose, would have the power to offset the discretion granted to the prosecutor so that in all cases the rule of law would be preserved. His delegation was happy to see that an institution of a similar type and mandate, the pre-trial chamber, had already found wide acceptance.

9. There were still many problems ahead, and work had to go on in the same spirit that had reigned in the Preparatory Committee. The broad participation by States in that Committee and the seriousness of their work proved that they were embarked on a common endeavour with a common goal: to establish an international criminal court. There seemed to be the general conviction that it ought to be established and, in his delegation's view, efforts to reach that common goal were on the right track.

10. Lastly, he reiterated his appreciation to the Government of Italy for having offered to host the conference of plenipotentiaries that would be held the following year in Rome.

11. **Ms. Letho** (Finland) said that her delegation fully supported the statement by the Netherlands on behalf of the European Union.

12. She expressed her appreciation to the Government of Italy for its generous offer to host the conference of plenipotentiaries, for all it had done to ensure its success, and for the information it had given on the organizational arrangements made or planned for the conference.

13. It was a powerful idea to establish a permanent international criminal court to try those guilty of the most serious crimes that caused international concern, thereby offering an institutional solution to the sad aftermath of such crimes. The very process of establishing the court proved the force of the concept. The past three years had witnessed growing and finally overwhelming support for the establishment of an international criminal court. More and more delegations were actively taking part in the negotiations, and the draft had received approval from all regions of the world and from outside professional and diplomatic circles. The important contribution being made by non-governmental organizations in mobilizing support for the court should also be underscored.

14. At the same time, the discussions on the statute of the future court had become more intensive and more result-oriented in a process in which all the participants had learned to understand each other's positions better. The work of the Preparatory Committee had reflected a consistent trend towards more constructive participation and more responsible cooperation. It should also be noted that the Preparatory Committee had shown great efficiency in dealing with the complicated questions before it and in handling the vast amounts of material provided by delegations on the various aspects related to the establishment of an international criminal court.

15. That was a good point of departure for the remainder of the preparatory period. In her delegation's view, two prerequisites must be fulfilled in order to ensure the success of the work prior to the Rome conference. First, the habit of hard work and the spirit of cooperation that had characterized the earlier sessions of the Preparatory Committee must be preserved. She referred, in particular, to the progress achieved during the year with regard to the question of admissibility of cases before the court and to the definition of crimes, general principles of criminal law, penalties, and the rules of procedure and evidence. Secondly, an effort must be made to avoid overloading the statute with too much detail. It was better to establish clear and balanced basic rules rather than multiple specifications, whose elaboration would be better left to the court itself or a conference of States parties at a later stage and at a lower level of the hierarchy of norms.

16. As a practical matter, the Preparatory Committee should also devote some time to the consideration and finalization of the rules of procedure of the conference, which should address, *inter alia*, the question of participation in the negotiations and drafting. Her delegation wished to note in that respect that all committees and working groups of the conference should be open-ended so as to ensure the transparency of the proceedings. Every effort should also be made to ensure meaningful participation of non-governmental organizations in the conference.

17. The growing commitment to the idea of a court had been demonstrated the year before by the adoption of General Assembly resolution 51/207, which set the date for the conference of plenipotentiaries with a view to finalizing and adopting a convention on the establishment of an international criminal court. Her delegation strongly supported that decision and reaffirmed its commitment to the objective of establishing, within the given time-frame, an independent, effective and accessible court.

18. Wider participation would promote the universality of the future international criminal court. To that end, the resolution established a special fund for the participation of the least developed countries in the work of the Preparatory Committee and in the conference. Finland was one of the countries that had voluntarily contributed to that fund.

19. The conference in Rome would provide an opportunity for States to demonstrate their commitment to the objective of establishing an effective international criminal justice system. Her delegation was confident that the conference would successfully accomplish its mandate and adopt a convention on the establishment of an international criminal court.

20. **Mr. Al-Hussein** (Jordan) expressed his delegation's gratitude to Mr. Adriaan Bos for his outstanding work as Chairman of the Preparatory Committee and for presenting a clear and precise report on the results of the most recent session of the Committee, held from 4 to 15 August 1997. He also welcomed the recent decision taken by a number of indicted persons in Bosnia and Herzegovina to surrender voluntarily to the International Criminal Tribunal for the Former Yugoslavia for prosecution. That action would not only facilitate the work of the Tribunal but would also foster general optimism with regard to the setting up of an international criminal court.

21. In his book entitled *Sagittarius Rising*, published in 1936, the British writer Cecil Lewis referred to "the invincibility of man's stupidity". The creation of an international criminal court, perhaps the most sane

international undertaking since the establishment of the United Nations, was a profound challenge to that assertion. In June 1998, humankind would have an opportunity to prove that its general stupidity was not invincible but rather vulnerable; that a credible system of justice could be forged as a deterrent to those who contemplated genocide or other most serious crimes, or, if it did not act as a deterrent, as a mechanism for bringing a case before an international criminal court against those believed to be guilty, not only in order to reveal the truth but also to afford some measure of justice to the victims.

22. His delegation welcomed that undertaking and joined the other delegations that had expressed their satisfaction at the progress achieved during the most recent session of the Preparatory Committee, although it realized that much remained to be done with regard to complementarity and trigger mechanisms. While it was essential to reach a broad consensus on the instrument to be used for exercising the principle of complementarity, the safeguards designed to protect national jurisdictions must not be overbuilt. Too many safeguards would make it so time-consuming and difficult for a State party to file a complaint with the court that the only realistic alternative available to that State would be to go before the Security Council, which, in turn, could inadvertently compromise the delicate balance being sought between the independence of the court and the functions of the Council.

23. His delegation looked forward to the next session of the Preparatory Committee with a view to moving closer to realizing the final objective of establishing a permanent, functional and credible international criminal court.

24. **Mr. Saland** (Sweden) said that his delegation fully subscribed to the views stated by the Netherlands on behalf of the European Union. He simply wished to add a few comments as a delegate to the Preparatory Committee and as the coordinator for the chapter on the general principles of criminal law in the draft Statute of the International Criminal Court.

25. His country's basic positions on the topic were well known. It strongly supported the speedy establishment of an effective international criminal court.

26. The Preparatory Committee deserved praise. Its working methods had improved considerably. There was now a sense of urgency which translated into business-like and constructive proceedings. It was a matter of pride that Sweden was among the countries which had made financial contributions in order to facilitate the participation of the least developed countries.

27. The improvement of the working methods was beginning to achieve results. There was a greater awareness of the need to find innovative compromises to bridge the gaps between the approaches taken by different legal systems. Most delegations had realized the need to move on from an infertile discussion on the relative merits of one or the other system. In fact, the different approaches led more or less to the same results, although by different routes. The relevant questions were: what was the aim and how could it be achieved? That way of working had been extremely helpful in dealing with personal criminal responsibility in the Working Group on the General Principles of Criminal Law. It had been equally productive in the discussions on the Pre-Trial Chamber in the Working Group on procedural matters. The provisional agreement reached on that subject was one of the main achievements of the August session and would facilitate the search for compromises on other procedural questions. Another excellent example of an innovative approach which could bridge differences was the compromise reached on the possibility of abbreviated procedures in the case of a guilty plea.

28. The best example of what could be achieved when there was a genuine will to compromise was the provisional agreement on the material grounds for admissibility, addressed in article 35. Complementarity was one of the three or four complexes of politically loaded and very closely interlinked questions. He was confident that the compromise reached would facilitate the task of solving the problems of the trigger mechanisms and the opt-in system.

29. Some very promising proposals, such as the one by Singapore, had been put forward on the question of the power of the Security Council to block action by the Court. The view of the United States that complaints submitted by States parties should be similar in nature to the matters referred by the Council merited further study, as did the French ideas about the procedural handling of the question of admissibility. Germany's efforts with regard to the definition of aggression also deserved commendation.

30. Another positive factor was the very broad majority in favour of limiting the Court's jurisdiction to the three or four hard-core crimes. If a provisional agreement could be reached on the number of crimes on the list, many other things would fall into place.

31. Another positive trend was the realization that the Statute must not be overburdened with detail, and that it was preferable to include many of the topics in the rules of procedure and the rules of evidence. The rules of procedure need not be finally agreed at the present stage. The idea of a shorter but precise Statute had been of great help to the

Working Group on the General Principles of Criminal Law in February and would no doubt also be important when the subject of defences was taken up in December. He was confident that the proposals made on that issue would facilitate the search for a solution.

32. All in all, his country was very pleased with the way in which the work of the Preparatory Committee was proceeding. It was moving in the right direction, and that was a cause for optimism. Sweden looked forward with confidence to the remaining two meetings of the Preparatory Committee and to the forthcoming conference in Rome, which should last at least five weeks. It also attached great importance to the participation of non-governmental organizations in the conference so that they might continue to contribute to the realization of the Court with the same efficiency as they were displaying in the Preparatory Committee.

33. Sweden reiterated its gratitude to Italy for offering to host the forthcoming conference of plenipotentiaries and to the Netherlands for its generous offer of The Hague as the seat of the International Criminal Court.

34. **Mr. Wenaweser** (Liechtenstein) said that his delegation wished to emphasize the importance of the establishment of an International Criminal Court. Over the past few years that idea had gained momentum through the combined efforts of Governments and civil society. However, there was a very long way to go before a Statute could be adopted which would truly serve to break the vicious circle of impunity and violation of human rights and the rules of international humanitarian law.

35. The Preparatory Committee had been working seriously and effectively, without venturing into areas of conceptual disagreement of a political nature, and making sincere and innovative efforts to overcome the differences between national legal systems in order to create a universal body. However, there were major outstanding issues which would require political decisions at the highest levels and even increased willingness to compromise and open-mindedness. His country reiterated its view that the International Criminal Court must be independent of political bodies such as the Security Council, that it must operate only on the basis of international law, the strengthening of which was the ultimate goal of the whole exercise, and that its jurisdiction, at least in the initial stage, should be limited to the core crimes of genocide, crimes against humanity, and war crimes and be based on the principle of complementarity. That would ensure the acceptance of the Court's inherent jurisdiction over those crimes by all States when they became parties to the Statute.

36. With regard to the convening of the diplomatic conference in Rome and the resolution which had to be adopted at the present session of the General Assembly, his country believed, firstly, that in view of the crucial importance of the work of non-governmental organizations in the creation of the International Criminal Court and of their expertise in the numerous areas covered by the Statute, the resolution should provide clearly for their full participation in the conference, while preserving the intergovernmental nature of the process.

37. Secondly, it should be noted that a large number of small countries attached importance to the establishment of an International Criminal Court. The history of the negotiations showed that the contributions from small States had often proved essential to the consideration of the provisions of the Statute. Therefore, in order to maintain the universal character of the process, arrangements should be made to facilitate the participation of small States in the diplomatic conference. His delegation also stressed that the adoption of the Statute should be the primary goal in 1998 and stated its willingness to display flexibility to achieve that goal.

38. **Mr. Pham Truong Giang** (Viet Nam) said that the prevention and suppression of international crimes which constituted a danger for all States and the punishment of those responsible required coordinated action on the part of a large number of States and an effective juridical body.

39. The concept of complementarity was the core of the text. The competence of an international criminal court could not exceed or replace national jurisdiction. The principle of the primacy of a State's national jurisdiction must be guaranteed. As subjects of international law, States should have prior jurisdiction over all relevant cases. Since it would be created by States to act on their behalf, and to act only within a sphere of competence determined by States, the international criminal court should have no power to define or assess a State's jurisdiction.

40. In keeping with the principle of complementarity, the international criminal court would initiate procedures only when permitted to do so by the States that had created it and when national jurisdiction was exhausted. The opt-in mechanism, under which States were to declare whether they accepted the court's jurisdiction, was of great importance, since it was designed to protect the sovereignty of Member States. Attention should also be paid, however, to the court's independence, which was crucial to its effectiveness. Serious consideration should therefore be given during the drafting process to the definition of national jurisdiction and the jurisdiction of the court, and the harmonization of the two.

41. The court's universality and effectiveness could be ensured only if its establishment and operation did not encroach on State sovereignty. State sovereignty and equality between States were accepted as fundamental principles of international law. Any proposal detrimental to State sovereignty would not be accepted. Furthermore, no effective results could be achieved without the participation of the State concerned in a criminal case.

42. Another crucial element was the definition of the core crimes that would be within the court's jurisdiction; that must be the subject of general agreement among States. There should be no overlap between the jurisdiction of the court and national jurisdictions.

43. The proposed provisions to regulate relations between the Security Council and the future international criminal court needed greater study, due regard being given to the independent nature of the court.

44. His delegation supported the initiative to establish a trust fund to help the least developed countries to participate in the process of codifying and establishing the international criminal court, in accordance with paragraph 7 of General Assembly resolution 51/207 of 17 December 1996. His delegation thanked the Government of Italy for its offer to host the diplomatic conference in 1998 and reiterated its willingness to cooperate with the other States concerned in the drafting process.

45. **Mr. Effendi** (Indonesia) emphasized the importance which his country attached to the establishment of a mechanism whereby perpetrators of heinous crimes could be brought to justice. The discussions in the Preparatory Committee and the working groups had been most useful and had enabled the Committee to achieve an understanding of the complex issues involved. Several important issues, however, warranted further in-depth consideration, with a view to bridging diverse viewpoints and concerns. His delegation hoped that the forthcoming meetings of the Preparatory Committee would yield consensus on such major issues as the definition of crimes, the principle of complementarity, jurisdiction, the role of the Security Council, the trigger mechanism and other procedural factors. Only the achievement of a general understanding during the deliberations in the Preparatory Committee would ensure a successful conclusion to the diplomatic conference and secure universal participation in the formulation of the statute.

46. **Mr. Simonovic** (Croatia) said that the recent tragic events in his country, in Bosnia and Herzegovina and in Rwanda had alerted world public opinion to the problem of protecting human beings in turbulent times and had given a crucial impetus to the work of establishing an international judicial body. The Committee should take advantage of the momentum. As the experience of the countries he had mentioned showed, there could be no peace or stability unless the perpetrators of grave violations of international humanitarian law were brought to justice. The international criminal court should serve as a mechanism for achieving justice and also as a deterrent. It would thus contribute substantially to the maintenance of international peace and security. His country had always supported the establishment of an independent judicial body, on the basis of the freely expressed sovereign will of States. His delegation expressed its satisfaction that all interested States had been invited to take part in the preparatory work. That approach would certainly contribute to universal acceptance of the court.

47. The international criminal court should be established by an international treaty as an independent institution with international legal personality. The court's independence would certainly contribute to its universal acceptance and to the strengthening of its authority. In order to achieve universal acceptance, its statute should reflect all the major legal systems. Legal concepts and rules taken from those systems should be harmonized with existing international law, so as to avoid attempts to apply incompatible concepts. The court should reflect the basic principles of international law and should function within the existing world legal order. Furthermore, the provisions of its statute should be clear to all lawyers, whatever legal system they belonged to. As an independent body, the court should be closely linked to the United Nations, which, in turn, should, in accordance with its purposes and principles and on the basis of a separate international treaty, guarantee funding for the court.

48. The Security Council should be able to refer to the court those crimes that fell within its competence, without prejudice to the freedom of States to lodge complaints when they considered that there was a reasonable basis for prosecution. Moreover, the Security Council's power of veto should not interfere in any way with the work of the court, which would be effective only if it was an independent body free of political influence and pressure. Otherwise its credibility and authority would be undermined. Nonetheless, the court should respect the resolutions and decisions adopted by the Security Council in accordance with the powers vested in it by the Charter of the United Nations. Moreover, the court should not be able, simply by virtue of its establishment under United Nations auspices, to supplant the authority possessed by any other United Nations body. In order to be effective, the court must confine itself to the authority specifically delegated to it.

49. A unique convergence of idealism and pragmatism was required for the establishment and successful functioning of the future court. Idealism, because the very notion of such a court was based on a universalism that tugged at the conscience of mankind and called for common action in the interests of justice. Pragmatism, because the world was made up of sovereign States and the international legal system was constructed around that political and legal reality. With those principles in mind, his delegation supported the view that the statute of the court should contain precise provisions on the principle of complementarity. Those provisions should be based on the principle of State sovereignty, a fundamental principle of international law embodied in the Charter. States bore the primary responsibility for preventing violations of international law and punishing the perpetrators of crimes. Resort to the court should therefore be made only when national systems were unavailable, when they were unable to provide due process of law or when they acted *mala fide*.

50. His delegation thanked the Government of Italy for its generous offer and welcomed the steps that it had taken to bring the diplomatic conference of plenipotentiaries to fruition. It reiterated its view that the participation of non-governmental organizations and other relevant organizations in the conference was desirable.

51. **Mr. Yengejeh** (Islamic Republic of Iran) said that almost since the inception of the United Nations, the General Assembly had recognized the need to establish an international criminal court to prosecute and punish perpetrators of war crimes, crimes against humanity, genocide and aggression. The times were propitious for realizing the aspirations of the international community and taking advantage of the momentum created by the establishment of the two ad hoc tribunals by the Security Council and the practical experience gained. Certainly, the establishment of an international criminal court by the end of the United Nations Decade of International Law at the threshold of a new millennium would be another milestone towards achieving peace and justice, two indivisible components of a global civil society.

52. The Preparatory Committee had taken major steps to facilitate a diplomatic conference in order to finalize and adopt the statute of the international criminal court. It had accomplished a great deal that year and had considered various core issues relating to the drafting of the statute of the court. While consensus seemed to be emerging on certain issues, there were still diverging views on many others. In his opinion, a number of issues could be resolved only by the diplomatic conference while others would have to be discussed further in order to narrow the options before any decisions were taken on the relevant provisions of the statute. The Preparatory Committee should take full advantage of the limited time left and prepare a comprehensive, consolidated text which would win general acceptance at the diplomatic conference.

53. He drew attention to some elements which were essential to the effective functioning of the court. First, his delegation supported the recommendation of the Preparatory Committee that the General Assembly should accept the Government of Italy's offer to host the diplomatic conference of plenipotentiaries for the establishment of an international criminal court, which would be held in June and July 1998 in Rome, and which would coincide with the fiftieth anniversary of the adoption of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Second, a narrow scope of jurisdiction for the international criminal court, at least at the initial stage, would facilitate universal acceptance of the statute and, consequently, its early entry into force. Iran favoured the inclusion in the statute of the crime of genocide, serious violations of the laws and customs applicable in an international armed conflict and grave breaches of the four Geneva Conventions of 12 August 1949, which were binding on 186 States, virtually the entire international community. It also strongly supported the inclusion of the crime of aggression as a punishable act. Third, the relationship between the court and national jurisdictions was one of the most important factors for universal acceptance of the court and for its success. There seemed to be general agreement that the court would be complementary to national criminal justice systems. His delegation believed that resort to the court should be limited only to situations where domestic trial procedures were not available or were ineffective. The court must therefore avoid unnecessary interference in cases where there was an effective national judicial system. Fourth, the question of the relationship between the international criminal court and the Security Council was one of the areas that required further discussion within the Preparatory Committee in order to reduce the number of divergent positions. On the one hand, there were those who would prefer to see an independent international criminal court free from the influence and interference of political organs, plainly a prerequisite for an independent judicial body. On the other hand, there were those who argued that the Security Council, which bore primary responsibility for the maintenance of peace and security, should be able to refer specific cases to the court.

54. In the opinion of Iran, the responsibility of the Security Council under the Charter to determine if an act of aggression had been committed should in no way undermine the role of the court as a judicial body. In specific situations the court might be in a better position to render judgement

on cases related to an act of aggression. For example, there had been instances where the Security Council had failed to discharge its responsibility in accordance with Article 39 of the Charter. Therefore, the statute must contain a clear provision empowering the court to render a judgement in cases where an act of aggression had been committed, should the Security Council fail to fulfil its mandate within a specified period of time.

55. In conclusion, he emphasized that the ongoing deliberations, which had begun with the adoption of General Assembly resolution 47/33, and which, he hoped, would conclude with the adoption of the statute of an international criminal court, were of a unique character. Active participation by all States was a prerequisite for the success of that important endeavour.

56. **Mr. Hamdan** (Lebanon) said that much progress had been made in the preparation of the draft statute of an international criminal court. It would not be appropriate to discuss the details of the draft as yet. His delegation would follow closely all future discussions and would, in due course, state its position on the matter. It would, however, like to make a few comments. First, it hoped that the Sixth Committee would guarantee broad participation in the activities of the Preparatory Committee, including participation by representatives of developing countries and of specialized non-governmental organizations. Second, the establishment of an international criminal court should constitute a foundation for the achievement of justice for all, particularly for small States. Furthermore, the court should not be used as an instrument for interfering in the internal affairs of States; therefore, all States must cooperate in order for it to maintain its independence and efficiency. Third, the court should have jurisdiction to render judgement on crimes of aggression. If the draft was to be limited to certain crimes, provision would have to be made for reviewing it after a certain amount of time had elapsed — the exact amount would be established during the discussions. The parties would have to decide the details of such a mechanism in due course and the statute would have to refer to the review mechanism.

57. In conclusion, he underscored the need for the Preparatory Committee to adopt a method of work that would prevent any clash between meetings so that delegations with limited staff could participate in all debates.

The meeting rose at 11.20 a.m.